University Townhouses Cooperative *and* Local 79, Service Employees International Union, AFL-CIO. Case 7-CA-17652

March 31, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 2, 1981, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs, and Respondent filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith and to adopt his recommended Order as modified herein.

The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(1) of the Act by imposing harsher work rules on its employees in retaliation for the employees' support of the Charging Party Union[2] and further violated Section 8(a)(1) by encouraging the employees to abandon their union activities in exchange for rescission of the harsher work rules originally imposed in violation of the Act. The Administrative Law Judge also correctly found that Respondent terminated Hershell Hugh Darnell in violation of Section 8(a)(3) and (1). Further, we agree with the Administrative Law Judge that employee Manith Armstrong was not an agent of Respondent and, therefore, any statements made by Armstrong that might be construed as threats of reprisal are not attributable to Respondent.

The Administrative Law Judge also found, however, that Respondent's discharge of Charles E. Brown and Michael D. McPeake did not violate the Act. In so finding he concluded that "the General Counsel had failed in his proof," inasmuch as any animosity harbored by Respondent against Brown and McPeake for their union activities "must be deemed to have been erased" after Brown and McPeake abandoned the union organizational campaign and joined Respondent's property manager in celebration of that event. We find that the Administrative Law Judge erred in both his analysis and his conclusion.

Our review of the record reveals that the General Counsel presented ample evidence to support the inference that a motivating factor in Respondent's discharge of Brown and McPeake was their union activities. In this regard, the record is replete with evidence of the union animus of Respondent, as expressed through the actions and statements of its property manager, Restrepo. Thus, within 4 days of the employees' first formal meeting to discuss unionization,[3] Restrepo called the employees to a meeting during which he unlawfully imposed a number of harsher working conditions. When asked by Brown whether he (Restrepo) thought this action was "a little harsh," Restrepo replied, "Don't you think I know what's going on around here? Do you think I am blind as to what's going around here? Under the circumstances I don't think this is hard."

Approximately 1 week later, a group of employees, including Brown and McPeake, met with a representative of the Union and obtained and signed authorization cards. The next day Brown gave cards to Manith Armstrong and Hershell Darnell. (As discussed below in more detail, Darnell was terminated in violation of Sec. 8(a)(3) of the Act 4 days after signing an authorization card.) Armstrong then informed Restrepo that all of the service employees had signed authorization cards. Three days later, Restrepo called another employee meeting imposing still another series of harsher working conditions and designating Manith Armstrong as being in charge of shop keys and inventory as part of the newly instituted regimen.[4] When asked why these steps had been taken, Restrepo replied that Armstrong was the only employee he could trust and that he felt like he had been stabbed in the back.

On the same day, Restrepo terminated Hershell Darnell. The facts surrounding Darnell's termination are fully set forth by the Administrative Law Judge and need not be repeated here except to note

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Hereinafter referred to as the Union.

[3] The first formal meeting among employees to discuss the formation of a union took place on January 27, 1980, and not in late December 1979 as stated by the Administrative Law Judge. We do note, however, that uncontradicted testimony of Brown and McPeake provides that the employees did begin discussing the formation of a union on an informal basis in December 1979.

[4] Although we reject the General Counsel's assertion that Armstrong acted as an agent of Respondent, we believe that the Administrative Law Judge properly inferred that Armstrong did serve as a liaison between the employees and Restrepo, keeping the latter informed of any new developments on the Union and related matters.

that, when Darnell pressed Restrepo for a reason for his termination, Restrepo stated that he "couldn't have people working there that wasn't [sic] loyal to him," and "couldn't have people he couldn't trust."

On the next day, February 12, Restrepo by memorandum modified the policy of employee breaktime, requiring them to take breaks at specified times rather than at their convenience. Then, on February 13, Brown and fellow employee Cummings met with Restrepo. Restrepo told them that if they could settle without the Union he would establish an open door policy whereby he (Restrepo) could take care of any employee problems. He told Brown and Cummings that even up to the day before the election he would be receptive to the idea of dropping the Union and, if this were done, nothing would happen and they could go on from there and "pick up the pieces." As found by the Administrative Law Judge, Restrepo's statements promising a return to the less onerous conditions in exchange for abandonment of the Union plainly violated Section 8(a)(1).

Following the February 13 conversation with Restrepo, several of the employees decided to abandon the union effort. Brown and McPeake met with Restrepo on February 14 to so inform him. Restrepo stated, *inter alia*, that he was incredibly relieved the union matter was over and that things could be back to normal. He stated further that he had not wanted to fire anyone but he had to do something, and that "[he] just couldn't sit back and let it happen." When asked by Brown why he had instituted the harsher working conditions, Restrepo said, "Hey, you guys were doing your thing, and I was doing my thing. If somebody does something to me I do something back to them. If somebody slaps me on the cheek, I don't believe in the Christian ethics, and I do not turn the other cheek." Restrepo then suggested that he and the employees celebrate. On the next night, Restrepo and the employees went out drinking together. Subsequently, the employees did abandon the union campaign.

It is against this background that the discharge of McPeake and Brown, which took place within 3 weeks after the employees abandoned the Union, must be viewed. In this regard, Respondent's union animus is manifest. From the very outset of the employees' campaign, Respondent, acting though Restrepo, embarked on a course of conduct aimed at coercing, intimidating, and otherwise compelling the employees to abandon their protected activities. At each successive step in the organizing process, Restrepo imposed harsher working conditions until such time as the employees began to discuss a cessation of their activities. At that point, Restrepo offered to cease the ulawful coercion in exchange for the employees' relinquishing their rights. Having succeeded in defeating the union effort through discrimination, coercion, and unlawful promises, Restrepo had good cause, from his perspective, to suggest a celebration.

Of further significance is the fact that Brown and McPeake were two of the most active union advocates. Both attended the initial employee meeting to discuss forming a union. Indeed, the meeting took place at Brown's home. Brown was the person who contacted the Union and distributed cards. Also, at the meetings called by Restrepo to impose harsher working conditions, Brown and McPeake each raised questions as to the propriety of such actions with Brown threatening to take up the matter of the docking of paychecks with the National Labor Relations Board.

In view of the foregoing, we cannot say, as did the Administrative Law Judge, that the General Counsel "failed in his proof" merely because Restrepo engaged in a drinking celebration with the employees after they had ceased union activities. A single act of pecuniary friendship hardly serves to erase a calculated course of conduct aimed at stifling employee rights. Union animus and unlawful acts of discrimination and coercion are not "erased" simply because an employer's effort to thwart the union is successful. In short, the General Counsel has plainly made out a *prima facie* case sufficient to support the inference that a motivating factor in the discharge of McPeake and Brown was their union activities.

Because the Administrative Law Judge determined that the General Counsel failed in his proof, he did not undertake to examine the validity of Respondent's asserted reasons for the discharge of Brown and McPeake. Our review of the evidence leads us to conclude that such reasons cannot withstand close scrutiny, and that Respondent used the drinking incident described below as a pretext to discharge Brown and McPeake for their union activities.

With regard to the discharge of Brown and McPeake, the record reveals that on March 4, 1980, approximately 2-1/2 weeks after the employees had abandoned the union organizing efforts, McPeake was authorized to work 2 hours of overtime from 5 to 7 p.m. Brown, who had completed his regular work at 5 p.m., was "on call." On-call employees of Respondent were required to remain at or near the complex ready to respond to any emergency calls. McPeake completed his work around 7:15 and began working with Brown on an air gun Brown had brought to the shop.

At some time around 7 p.m.,[5] Billy Lyles, a cousin to Manith Armstrong who performs contract work for Respondent, entered the shop area shed where he found Brown and McPeake drinking beer. Lyles had been sent to the shed by Armstrong to retrieve a battery. Lyles remained with Brown and McPeake for approximately 15 minutes. He testified that McPeake appeared loud, vulgar, and staggering while Brown was quiet. After Lyles left, he told Armstrong that Brown and McPeake were drinking in the shed. Armstrong immediately called Restrepo and so informed him.

Meanwhile, after Lyles had left, Robert Augustus arrived at the shop. Augustus had been employed by Respondent the past summer and had come to the shop to see if a decision had been made regarding his employment for the coming summer. Several minutes after Augustus arrived, Restrepo appeared. He asked Brown and McPeake what they were trying to prove, told Augustus to leave, and told Brown and McPeake to clean the place up and that they would discuss the matter in the morning. Restrepo also asked McPeake if he was still on the clock. McPeake said no, mistakenly telling Restrepo he had punched out. After Restrepo left, McPeake signed out on his timecard for 7 p.m.

The next day, March 5, Restrepo met with Brown and McPeake. He told them that he had decided to discharge them. The reasons asserted for the discharge were drinking while on working time and allowing an unauthorized person in the shop.

In support of its position, Respondent asserts that it had a longstanding rule against the presence of unauthorized persons in the shop. A sign on the shop door stated that only employees were allowed inside and the employees were admittedly aware that such a rule existed. As for drinking on the job, Respondent concedes that drinking had, in the past, been condoned on numerous occasions, including, at least once, during working hours. Indeed, until several months prior to the union campaign, Respondent had supplied the employees with beer on Friday evenings. On or about January 11, 1980, however, Restrepo "cracked down" on drinking. He informed the employees that no drinking on the job or when on call would be permitted and that a breach of such rule would be cause for discharge. Respondent's position, therefore, in its simplest form, is that McPeake and Brown were aware of the rules against unauthorized persons in the shop and drinking while on the job or on call, that they breached these rules, and that, accordingly, the discharges were lawful. We disagree.

With regard to the rule against unauthorized personnel in the shop, it is clear on the record that this rule was honored more in its breach than in compliance. Several witnesses testified without contradiction that, although a "rule" existed, it was virtually never enforced. On nearly a daily basis, persons not technically authorized to enter the shop did so. These included tenants of the co-op as well as various outside salesmen and contractors.

In any event, Augustus could hardly be deemed an "unauthorized person." Augustus had been employed by Respondent the past summer as a serviceman and was present only to inquire as to his possible status the next summer. In addition, he was there of his own volition and not as a guest or invitee of either Brown or McPeake.

The matter of Brown's and McPeake's drinking presents a somewhat closer question. On the whole, however, we believe that the incident would not have resulted in a discharge absent Restrepo's established union animus and Brown's and McPeake's numerous union activities.

Initially, we note that the existence of the rule whereby drinking was cause for immediate discharge is suspect. By Respondent's own admission, such a rule did not surface until January 11, 1980, several weeks after the employees began to discuss formation of a union. Prior to the organizational efforts, employees drank beer at the complex on repeated occasions during worktime without any formal discipline.[6] Indeed, in September 1979 McPeake had been drinking while on the job on a day when Respondent's governing board was meeting. While painting a door, McPeake painted over windows and did an otherwise sloppy job which was viewed by board members. After the incident, McPeake agreed with Restrepo that he should not receive overtime pay for his performance but no formal warning was entered in McPeake's personnel file.[7]

This dichotomy between Restrepo's reaction to employees' beer drinking after organizing efforts as opposed to before was further demonstrated at the

[5] Lyles testified that he arrived at the shop between 6:30 and 7, stayed 15 minutes, and then returned to Armstrong's home where Armstrong called Restrepo. Restrepo testified that he received Armstrong's call at 8 p.m. We find that Lyles' visit to the shed was no earlier than 7 p.m.

[6] We also find it significant that Respondent's "Employment Handbook" contained a progressive disciplinary scheme whereby "serious" infractions were to result in a discharge only after the employee received a verbal warning with a notation in the personnel file *and* a written warning also to be placed in the personnel file. Respondent presented no evidence that such steps had been taken against Brown or McPeake. See *Butler-Johnson Corporation*, 237 NLRB 688, 690 (1978), where a respondent's failure to adhere to an established disciplinary scheme was found to be evidence of unlawful intent.

[7] It would appear that the September 1979 incident was a much more grievous offense than that presented in the instant case. In the September incident, McPeake was viewed by Restrepo's employers, while the discharge incident occurred inside the shop, out of public view.

"celebration" on February 15 following the employees' abandonment of their union efforts. At the celebration, Brown, who was on call, asked Restrepo if drinking while on call was all right. Restrepo told him that it was, so long as the employee remained sober. Thus, as was the pattern established by the other unfair labor practices found herein, it appears that the rules and practice concerning drinking were lax prior to unionization efforts, tightened up during the campaign, and then relaxed again after the union drive had been thwarted.[8]

With respect to the actual events of March 4, Respondent's position that Brown and McPeake were drinking while "on the job" only obscures Respondent's real motive in terminating the two union activists. First, while Brown was on call, he had been told by Restrepo, on February 15, that he could drink while on call so long as he remained sober. There is no indication that Brown was less than sober. Lyles testified in this regard that Brown was quiet and had little to say. As for McPeake, he had completed his overtime work around 7:15 and for approximately 45 minutes had been helping Brown work on an air gun. When Restrepo appeared, McPeake stated that he had stopped working earlier and mistakenly added that he had punched out. After Restrepo left, McPeake did sign out for 7. Thus, although he was technically on the clock, McPeake's only real "offense" was his failure to punch out. The record reveals, however, that such failures were common occurrences and that employees routinely filled in their timecards after the fact. Indeed, the strict enforcement of rules concerning the timeclock arose only as part of Restrepo's retaliatory imposition of harsher work rules which we have found to be a violation of the Act.

In view of the foregoing, we are of the opinion that Respondent would not have discharged Brown and McPeake for their March 4 conduct absent Respondent's established union animus and Brown's and McPeake's engaging in union activities. In our view, Respondent seized upon the technical breach of rules by Brown and McPeake as a reason for ridding itself of two of the most active union adherents. Accordingly, we find that the discharge of Brown and McPeake violated Section 8(a)(3) and we shall provide the appropriate remedy.

Finally, the Administrative Law Judge stated in his Decision that, had the General Counsel requested a bargaining order as part of the remedy, he would have granted the request. Our dissenting colleague agrees that such an order is appropriate. We do not agree.

In so holding, we do not seek to minimize the egregious conduct of Respondent. However, as noted by the Administrative Law Judge, neither the General Counsel nor the Charging Party sought a bargaining order in the complaint or at the hearing. Indeed, despite the Administrative Law Judge's statement, no request by the parties has been submitted to the Board seeking a bargaining order remedy. While a party's request for a bargaining order is not necessarily a *sine qua non* for such a remedy, the apparent lack of a desire for a bargaining order gives us pause in unilaterally directing that one issue.

In addition, we agree with our colleague that testimony reveals seven employees signed cards. Unfortunately, the record reveals nothing more bearing on the majority status of the Union. Thus, the cards themselves were not introduced into evidence. Nor was there any testimony indicating what the signed cards stated or what representations were made to the employees concerning the cards at the time of their signing.[9] Although oral evidence going to majority status is sometimes accepted by the Board,[10] such evidence is customarily accompanied by at least some tangible or otherwise reliable evidence indicating what the employees actually designated on the cards they signed.[11] Thus, considering all the circumstances, we decline to issue a bargaining order in this case.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, University Townhouses Cooperative, Ann Arbor, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Hershell Hugh Darnell, Michael D. McPeake, and Charles E. Brown immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially

[8] As we noted above, the fact that Restrepo had successfully defeated the employees' efforts to unionize does not mean that all union animus disappeared and that all would be forgotten. Indeed, just 1 week before Brown and McPeake were discharged, Restrepo told Darnell that he could not put him back to work because he could have only employees that he trusted.

[9] Inasmuch as Respondent was never put on notice that majority status was, in any way, at issue, we cannot justly construe against it the failure to probe the testimony that cards were signed.

[10] *Aero Corporation*, 149 NLRB 1283, 1291 (1964).

[11] See, e.g., *Howard-Cooper Corporation*, 117 NLRB 287, 295 (1957), where the cards had been lost but oral testimony was accepted. There, however, the union submitted its standard authorization card and there was no evidence that it had altered its established practice.

equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered as a result of the discrimination practiced against them by paying each of them a sum equal to what he would have earned, less any net interim earnings, plus interest, to be computed in the manner set forth in the section of this Decision entitled 'The Remedy.'"[12]

MEMBER JENKINS, dissenting in part:

I cannot agree with my colleagues' conclusion that a bargaining order would not be appropriate herein. A review of the record in this matter clearly shows that Respondent's employees have abandoned their organizational drive largely because of Respondent's unlawful conduct. This conduct included retaliatory action against all seven of its employees (each of whom appears to have signed an authorization card), promises of more favorable working conditions if its employees would abandon the Union, and the unlawful discharge of three of its employees, two of whom were leading union adherents. Considering the small number of employees and the ferocity with which Respondent opposed its employees' protected activities, I am of the view that a fair election among Respondent's employees is no longer possible. That Respondent was willing to terminate more than 40 percent of its work force to achieve the result it desired clearly demonstrates its recklessness in destroying its employees' protected activities; those employees will not soon forget the wrath occasioned by such activities.[13]

Under these circumstances, I am of the view that a bargaining order would best protect employee sentiment already expressed through authorization cards; however, my colleagues do not agree.[14] Accordingly, I dissent.

[12] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[13] Cf. *United Oil Manufacturing Co., Inc.*, 254 NLRB 1320 (1981).

[14] I am impressed by the "evidentiary" issues raised by my colleagues regarding the majority status of the Union; however, inasmuch as we apparently are in agreement that a bargaining order otherwise would be appropriate, I submit that the better course would be to resolve these issues through the issuance of a Notice To Show Cause why a bargaining order should not issue rather than to leave these employees without a complete remedy because of the alleged failures of the General Counsel and the Charging Party.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discourage the concerted activities of employees or discourage their membership in Local 79, Service Employees International Union, AFL-CIO, or any other labor organization, by unlawfully and discriminatorily laying off or discharging any employees or discriminating against them in any other manner with respect to their hire, tenure of employment, or any term or condition of employment.

WE WILL NOT unlawfully change working rules and practices in retaliation for employees' engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Hershell Hugh Darnell, Michael D. McPeake, and Charles E. Brown immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges prevously enjoyed, and make them whole, with interest, for any loss of pay they may have suffered because of our unlawful discrimination against them.

UNIVERSITY TOWNHOUSES COOPERATIVE

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge: The original charge was filed by Local 79, Service Employees International Union, AFL-CIO, herein referred to as the Union, on April 14, 1980, and was served on University Townhouses Cooperative, herein referred to as Respondent, by registered mail on April 16, 1980. The amended charge was filed by the Union on May 30, 1980, and was served on Respondent on or about the same date. A complaint and notice of hearing was issued on May 30, 1980. The complaint alleges, among other things, that Respondent unlawfully discharged employees Hershell Darnell, Charles Brown, and Michael McPeake in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, herein referred to as the Act.

Respondent filed a timely answer denying that it had engaged in or was engaging in the unfair labor practices alleged.

The case came on for hearing in Detroit, Michigan, on November 22 and 23, 1980. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan.

At all times material herein, Respondent has maintained its only place of business at 3200 Braeburn Circle in the city of Ann Arbor and the State of Michigan, herein called the Ann Arbor place of business. Respondent is, and has been at all times material herein, engaged in the operation and management of a cooperative housing complex. Respondent's place of business located in Ann Arbor, Michigan, is the only facility involved in this proceeding.

During the year ending December 31, 1979, which period is representative of its operations during all times material herein, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000.

During the period of time described above, Respondent, in the course and conduct of its business operations, purchased and caused to be transported and delivered to its Ann Arbor, Michigan, place of business goods and materials valued in excess of $5,000, which goods and materials were transported and delivered to its Ann Arbor, Michigan, place of business from points located outside the State of Michigan.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 79, Service Employees International Union, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

First: The General Counsel contends that "Respondent issued procedural memoranda on January 31, February 11, and February 12, 1980 imposing harsher work rules on the service department employees and docked service department employees' pay checks in retaliation for the service department employees' support for the Union." This contention is well taken.

In the latter part of December 1979 (December 28), Respondent's service employees Michael D. McPeake, Charles E. Brown, John Lee Cummings, Matthew Dietrich, and Jeff Boyd met in Brown's apartment where they discussed "the possibility of getting in contact with somebody from the SEIU, to find out what the possibility of having a union at our townhouse for us." Brown's apartment was a part of Respondent's townhouse complex. At the meeting all the employees present signed a document "saying that [they] were interested in talking to somebody from the SEIU." Toward the end of the meeting Manith Armstrong, another service employee, was called on the telephone. He was informed of the happenings at the meeting and was asked if he would be interested in signing the document. Armstrong showed an interest. Dietrich and Brown then went to Armstrong's townhouse. When Dietrich and Brown arrived at Armstrong's apartment, Armstrong said he had changed his mind and did not want to sign until he had a chance to talk to his brother, Mandel Armstrong.[1]

On January 31, 1980, Property Manager Restrepo called a meeting of the service employees at which he issued a memorandum containing allegedly new work rules and allegedly pronounced stricter enforcement of previously unenforced rules. Some of these changes were: Employees were required to fill out timesheets accounting for each 5-minute period of the working day; employees were prohibited from taking breaks in their townhouses during working hours; employees were not to leave Respondent's premises during working hours except upon a request for permission addressed to the property manager; employees were not to use any of Respondent's vehicles for personal business at any time; access was limited to the property manager's office; paycheck adjustments were not to be made "after the fact"; no one was to adjust or alter a timecard; and lunch periods were to be between 12 and 1 o'clock. Conditions prior to these changes were: Timesheets were not required; breaks were taken in townhouses; employees were only required to notify the front office before leaving the premises; employees were allowed to use Re-

[1] The probabilities were that Armstrong reported the meeting incident to Property Manager Alonso Restrepo since the record reveals a proclivity on the part of Armstrong to report such matters to Restrepo. (Armstrong reported to Restrepo that the service employees had signed union authorization cards, that he had signed a card, and that Brown and McPeake were drinking in the maintenance shed. See *infra*.)

spondent's vehicles with the permission of the property manager; Restrepo and Cummings were permitted to write in the time on the timecard if an employee forgot to punch in or out; and employees were allowed to take their lunch breaks at their convenience.

The memorandum provided that a violation of any of its dictates would be grounds for termination. Such had not been the past practice. Also on January 31, 1980, a number of employees' checks were "docked" apparently because the employees punched their timecards incorrectly.

After the meeting Brown inquired of Restrepo why the employees had been "shorted," and Restrepo replied that "it was because of what has been going on around here." Brown then said that he "intended to pursue the matter with the National Labor Relations Board." The next day Restrepo informed Brown that he intended to restore the shortages. The shortages were included in the next weeks' paychecks.

McPeake quoted Restrepo as saying, when asked at the meeting if he did not think the new rules were a "little harsh," "Don't you think I know what's going on around here. Do you think I am blind as to what's going on around here. Under the circumstances I don't think this is hard."

On February 1, 1980, Hershell Darnell was hired as a painter's helper.

On February 7, 1980, McPeake, Brown, Cummings, and Boyd met with a union representative at the Popside Lounge in Ann Arbor, Michigan. The next day Brown gave union authorization cards to Dietrich and Darnell, who signed the cards. According to Armstrong, he informed Restrepo that the service employees had signed union authorization cards; he also informed Restrepo that he had signed a card.[2]

On February 11, 1980, Restrepo issued another memorandum changing certain policies and practices. It also provided:

> In order further to improve our system of inventory control, I am placing Manith Armstrong in charge of same. He will also be responsible for updating the time clock, signing shop keys and vehicle keys in and out, and for doing move-out inspections. His official title is "Shop Coordinator," and as such he is management's liaison with the department. (Any areas not under his jurisdiction will still be handled directly with the Property Manager.)

Restrepo was asked why Armstrong was chosen for this job and he answered that Armstrong was the only one he could trust; "he didn't trust the rest." When asked why he was "hassling" the employees "so much," Restrepo replied that he "felt like he had been stabbed in the back, and he thought he was a member of the team."

On February 11, 1980, Darnell was laid off.

A memorandum issued by Restrepo on February 12, 1980, changed the policy by requiring employees to take break periods at specific times rather than at their convenience.

Around February 13, 1980, after Brown had listened to Armstrong describe some of the events which would occur if the Union came in, such as that Restrepo "intended to put . . . enough of the Manith's family relatives on the payroll to load the election, and allow them all to go and vote no," Brown went to Restrepo's office where he complained about Armstrong's "being at the shed in the morning, and rattling on and on." On the way to Restrepo's office Brown met Cummings, who was also on his way to the office. Brown, Cummings, and Restrepo conversed. Among other things, Restrepo said:

> Al said that if we could settle without the union, that he was going to—he would establish an open door policy, whereby we could come to him with our problems when we had 'em, and he could take those problems to the directors and settle them.
>
> And that up to the last day before the election came down, that if we changed our minds, that he would still be receptive to the idea of dropping the union. He said, and nothing would happen to us if we dropped the union at this point in time, because we could go on from there and pick up the pieces.

The next day, February 14, 1980, Cummings, Brown, and McPeake defected. It had "come" to Brown that Cummings was "tired of the harassment" and that he was "done" with the union, at which point Brown and McPeake "folded." Thereafter, Brown and McPeake went to see Restrepo. Restrepo was advised that the employees were willing to call off the union venture; that they wanted to get things back to normal. He responded that, if the union activity was terminated, "there would be no repercussions." Restrepo further said, "I never wanted to fire anybody, but I had to do something. I just couldn't sit back and let it happen. I have a responsibility to protect the coop." Brown asked Restrepo why he had initiated some of the things in the memoranda. He answered:

> Hey, you guys were doing your thing, and I was doing my thing. If somebody does something to me I do something back to them. If somebody slaps me on the cheek, I don't believe in the Christian ethics, and I do not turn the other cheek.

Restrepo added that:

> . . . he would be incredibally [sic] relieved that it was all over, and everything could go back to normal; as long as the job got done, everything was cool. . . . [H]e specifically okayed that we eliminate the time sheets.

As the meeting ended Restrepo suggested that the employees "go out and celebrate." The following night, February 15, 1980, Restrepo and the service employees "partied" in Ann Arbor and Detroit. Besides Restrepo the group included Brown, McPeake, Armstrong, Cum-

[2] Armstrong testified, "I had just gotten the card. They held it back from me for awhile, 'till they found out how I felt about the union myself . . . . So then they got me a card, and I filled it out."

mings, Dietrich, and Boyd. Brown was on call but an exception was made for him.

Brown contacted the Union and by the next Monday the "petition was supposedly withdrawn."

The foregoing credited facts make it abundantly clear that Restrepo's change in the shop rules and practices detailed above was in retaliation for the union activities of Respondent's employees. These reprisals interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them under Section 7 of the Act. Hence, Respondent violated Section 8(a)(1) of the Act.

Second: The General Counsel contends that "Respondent violated Section 8(a)(1) of the Act when shop coordinator Manith Armstrong, acting as its agent threatened service department employees with reprisals because of their support for the Union."

This contention must fail since Armstrong was not an agent whose alleged misconduct may be attributed to Respondent. The General Counsel concedes that Armstrong was not a supervisor within the meaning of the Act. Brown testified that he had a "vague" idea as to the kind of work Armstrong performed. Armstrong's main duty as inventory coordinator was to "keep parts stocked on the shelves." He also "signed keys in and out for people." When Brown inquired of Restrepo what the relationship was between him and Armstrong, Restrepo stated that Armstrong had no supervisory powers over Brown and that Brown reported directly to Restrepo. According to Brown, "Manith really didn't have any power." Armstrong was a liaison between Restrepo and the rest of the service staff. There is no credited proof that he spoke for management or gave employees the impression that he spoke for management in connection with labor relations matters. Respondent was not bound by his alleged misconduct which the General Counsel claims was an unfair labor practice. Hence, it shall be recommended that this allegation be dismissed.

Third: The General Counsel next contends that "Respondent, through its agent Property Manager Restrepo solicited the service department employees to abandon the Union and promised to rescind the newly instituted work rule to encourage their repudiation of the Union in violation of Section 8(a)(1) of the Act."

The credited facts supporting this contention are set out above and reveal that the contention is well taken. When a respondent, as here, encourages its employees to abandon their union in return for more favorable working conditions, it violates Section 8(a)(1) of the Act. *Miami Springs Properties, Inc. and James H. Kinley and Associates, Joint Employers*, 245 NLRB 278, fn. 3 (1979). By such conduct Respondent violated Section 8(a)(1) of the Act.

Fourth: The General Counsel next contends that "Respondent terminated Hershell Darnell on February 11, 1980, because of his support for the Union in violation of Section 8(a)(1) and (3) of the Act." This contention is well taken. Hershell Darnell was hired on February 1, 1980, as a painter's helper. According to Restrepo, he had decided to dispense with outside contract painters and hire employees of Respondent to do the painting. His objective was an "inhouse painting crew." Darnell was the first person hired for this new venture. At the time Restrepo also expected to hire Mandel Armstrong, Manith Armstrong's brother, to engage in painting work.

Darnell was laid off on February 11, 1980. At the time of his layoff Restrepo told Darnell that it was a temporary layoff until Mandel Armstrong arrived for employment; that Armstrong was the main painter and Darnell would be his helper.

During the week of his employment, Darnell was assigned to visit "different paint companies, to try and get contracts to buy their paint, their supplies." At the end of the week Restrepo pointed out to Darnell the apartments which were to be painted starting the next Monday morning. On Monday morning Darnell began work on an apartment. As he was commencing to remove "wall planks and stuff," he was summoned to a meeting of employees after which, as above noted, he was laid off. At the time Restrepo stated that he was pleased with Darnell's "paperwork" and said it was an "excellent job."

During his week of employment, Darnell had signed a union card, an event which was related to Restrepo by Armstrong.

Darnell's testimony, which appears in the record without objection, in respect to a conversation with Manith Armstrong was as follows:

> A. I can't relate it exactly, word for word, so far back, but what it related to, he was concerned about seeing me hanging around with the intention that I was coming back to work, when he had stated that he knew that I wasn't coming back to work, and that I had made a mistake signing that card, which was referring to the union card. And that Al Restrepo had told him that no way was I coming back to work for University Townhouses.
>
> Q. Did he say why Al Restrepo wouldn't take you back?
>
> A. Yes, sir, he referred to the union card I had signed.

When Darnell heard that Mandel Armstrong had gone to work, Darnell contacted Restrepo and asked when he could return to work. Restrepo replied that "he couldn't have anybody working there that wasn't loyal to him" and "couldn't have people he couldn't trust." Darnell was never recalled by Respondent.

When Mandel Armstrong commenced painting for Respondent, according to Restrepo he "hired a bunch of part-timers at a considerably lower rate, because they were inexperienced, and we were teaching them the job."

The General Counsel has met his burden under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), for establishing a *prima facie* case.

Respondent maintains that "Mr. Restrepo simply concluded that Mr. Darnell's continued employment in view of his poor performance and lack of experience as a painter, was not justified. In short, the termination of Mr. Darnell was based solely on a legitimate business consideration; poor job performance during the probationary period." Poor performance was not proved by credited

evidence and lack of experience was not a factor considered by Respondent when it hired Darnell's replacements. Respondent hired inexperienced persons to replace Darnell and was teaching them the job. There is no credible explanation in the record why Darnell could not have been treated in the same manner except that he was a union partisan. Since Respondent's business consideration defense fails and the General Counsel has established a *prima facie* case, the finding must be for the General Counsel. *Wright Line, a Division of Wright Line, Inc., supra.* Accordingly, it is found that Respondent's layoff of Darnell on February 11, 1980, and the failure to recall him thereafter violated Section 8(a)(3) of the Act.

Fifth: The General Counsel's final contention is that "Respondent violated Section 8(a)(1) and (3) of the Act when it terminated Charles Brown and Michael McPeake because of their union activities."

On March 4, 1980, Billy Leon Lyles visited the maintenance shed where he saw Brown and McPeake "drinking and shooting the bull." McPeake was "loud, vulgar, staggering and swearing, swayed, and leaned on a workbench." Brown was "quiet . . . he didn't say too much." Lyles reported the condition of McPeake and Brown to Manith Armstrong, whom he was visiting. Armstrong phoned Restrepo and informed him that Brown and McPeake were drinking on duty in the maintenance shed. Such drinking was in violation of Respondent's rules. Restrepo appeared at the maintenance shed where he found Brown and McPeake as described. McPeake had not punched out from working overtime and Brown was on duty. Restrepo told the employees to clean up the "mess" and he would "talk about what to do the next morning." Restrepo said, "What are you trying to prove."

When Brown and McPeake appeared the next morning, they were fired by Restrepo; however, Restrepo indicated that he would give the matter "24 hours." The next day when the employees reappeared, Restrepo informed them that he would "stick" with his original decision to fire them.

Assuming, *arguendo*, that Restrepo had harbored animosity against Brown and McPeake for their union activities, such animosity must be deemed to have been erased, lacking proof to the contrary, when Brown and McPeake disavowed the Union and joined with Restrepo in a celebration of the event in the beer parlors of Ann Arbor and Detroit. Thus, the General Counsel has failed in his proof. Hence, it shall be recommended that the 8(a)(3) allegation involving the discharges of Brown and McPeake be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act for jurisdiction to be exercised herein.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By unlawfully laying off Hershell Hugh Darnell on February 11, 1980, and failing to recall him to employment, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.[3] It also having been found that Respondent unlawfully laid off Hershell Hugh Darnell on February 11, 1980, and has failed and refused to recall him in violation of Section 8(a)(3) of the Act, it is recommended that Respondent remedy such unlawful conduct. In accordance with Board policy, it is recommended that Respondent offer the above-named employee immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, dismissing, if necessary, any employees hired on or since the date of his discharge to fill said position, and make him whole for any loss of earnings that he may have suffered by reason of Respondent's unlawful acts herein detailed by payment to him of a sum of money equal to the amount he would have earned from the date of his unlawful layoff to the date of said offer of reinstatement, less net earnings during such period, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[4]

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

[3] While during the hearing the General Counsel asked that "the rules as they were before the union came in" be reinstated, he also said that he would set out in his brief the specific rules he wanted reinstated. This has not been done. This omission may have resulted from the General Counsel's concluding that the rule situation was returned to normal after the employees' defection from the Union. In light of this, no remedy is recommended in this respect. It is deemed that the General Counsel has abandoned his claim for reinstatement of the rules as they were before the advent of the Union.

In view of the outrageous and pervasive unfair labor practices herein which in the foreseeable future have foreclosed any possibility of union representation for Respondent's employees, had the General Counsel requested it, I would have recommended a bargaining order. See *United Dairy Farmers Cooperative Association* v. *N.L.R.B.*, 633 F.2d 1054 (3d Cir. 1980).

[4] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[5]

The Respondent, University Townhouses Cooperative, Ann Arbor, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging the concerted union activities of its employees or discouraging their membership in Local 79, Service Employees International Union, AFL-CIO, or any other labor organization, by unlawfully and discriminatorily laying off its employees or discriminating against them in any other manner with respect to their hire, tenure of employment, or any term or condition of employment in violation of Section 8(a)(3) of the Act.

(b) Unlawfully changing working rules and practices in retaliation for employees' engaging in union activities.

(c) Unlawfully promising employees more favorable working conditions if they abandon the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Hershell Hugh Darnell immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired to replace him, and make him whole for any loss of pay he may have suffered by reason of Respondent's unlawful layoff in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its townhouses in Ann Arbor, Michigan, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint, as amended, be dismissed insofar as it alleges violations of the Act other than those found in this Decision.

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."